

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338

COMMENTS OF EVERETT LABORATORIES, INC.

Don J. Pelto
Christopher S. Huther
Kristin Cleary
PRESTON GATES ELLIS
& ROUVELAS MEEDS LLP
1735 New York Avenue, Suite 500
Washington, D.C. 20006

Dated: January 18, 2006

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	IF NOT PROPERLY IMPLEMENTED, THE JUNK FAX PREVENTION ACT WILL UNDULY HARM SMALL BUSINESSES.....	2
A.	Everett Supports the FCC’s Proposal to Remove Section 64.1200(a)(3)(i) From the Commission’s Rules.....	3
B.	Everett Opposes Limiting the EBR.....	4
C.	List-makers Should Bear the Burden of Proving that Contacts Were Listed Voluntarily.....	5
D.	Small Businesses Should Not Be Burdened with Excessive Record-Keeping Requirements.....	6
III.	THE FCC SHOULD RELY ON THE SMALL BUSINESS ASSOCIATION’S SMALL BUSINESS CATEGORIES	7
IV.	CONCLUSION	8

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338

COMMENTS OF EVERETT LABORATORIES, INC.

I. INTRODUCTION

The Telephone Consumer Protection Act (“TCPA”)¹ prohibits users of telephone facsimile machines (“fax machines”) from sending “unsolicited advertisements” to other fax machines.² The TCPA defines “unsolicited advertisements” as “any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person’s prior express invitation or permission.”³ The Federal Communications Commission (“FCC” or “the Commission”), which implements the TCPA, created an exception for fax transmissions being sent to entities with which the sender has an “established business relationship” (“EBR”).⁴ An EBR is defined, in relevant part, as being “formed by voluntary two-way communication...on the basis of an inquiry, application, purchase or transaction.”⁵ The

¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227 (2005).

² 47 U.S.C. § 227(b)(1)(C) (1991).

³ 47 U.S.C. § 227(a)(4) (1991).

⁴ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8779, n.87 (rel. Oct. 16, 1992).

⁵ *Id.* at 8771.

Junk Fax Prevention Act of 2005 (the “Junk Fax Prevention Act” or the “Act”) codifies this EBR exception.⁶

On December 19, 2005, the FCC released a Notice of Proposed Rulemaking (“NPRM”) seeking comments regarding the Junk Fax Prevention Act, and specifically the EBR exemption.⁷ Because it is aware of and sensitive to the unintended consequences of the Act, Everett Laboratories, Inc. (“Everett”) submits these comments for the Commission’s review. As currently phrased, the Junk Fax Prevention Act can seriously damage small businesses. Everett is a pharmaceutical company based in New Jersey that markets and sells various prescription-only nutritional supplement products throughout the United States. Everett, having fewer than 75 employees, qualifies as a small business under the Small Business Administration’s definitions.⁸ Everett has used the fax machine to alert medical professionals about its prescription products, and urges the Commission to consider the impact the Act will have on similarly situated small businesses. Everett hopes the following comments will allow the FCC to recognize the reasonable and appropriate ways that fax transmissions are used in the normal course of business, and to protect the abilities of well-intentioned small businesses to operate under the Junk Fax Prevention Act.

II. IF NOT PROPERLY IMPLEMENTED, THE JUNK FAX PREVENTION ACT WILL UNDULY HARM SMALL BUSINESSES

Healthy small businesses fuel the American economy. Small businesses provide

⁶ Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The Junk Fax Prevention Act was signed into law on July 9, 2005.

⁷ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, 05-338, Notice of Proposed Rulemaking, 70 Fed. Reg. 75,102 (rel. Dec. 19, 2005) (“NPRM”).

⁸ See *infra* note 19.

75 percent of the market's net new jobs each year,⁹ and employ more than half of the American workforce.¹⁰ While the FCC has proposed implementing the Junk Fax Prevention Act in a way that will better protect small businesses, the Commission should go further to ensure that the Act benefits both businesses and consumers, and should eliminate the potential for small businesses to be abused by individuals and groups seeking to use the Act for improper gain.

A. Everett Supports the FCC's Proposal to Remove Section 64.1200(a)(3)(i) From the Commission's Rules

The NPRM seeks comments on removing § 64.1200(a)(3)(i) of the Commission's rules which provides that a facsimile advertisement is unsolicited unless "the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that * * * clearly indicates the recipient's consent to receive such facsimile advertisements from the sender."¹¹

Small businesses conduct operations differently than larger companies, typically with limited staff and means. As such, requiring small businesses to acquire written permission prior to contacting intended recipients by fax effectively prevents them from contacting prior and potential business partners and customers. Everett strongly supports the FCC's recognition that business relationships are expressed in many different ways and believes that this flexible approach to the EBR more closely reflects the realities of doing business. Furthermore, Everett appreciates the FCC's attempt to reduce administrative overhead for small businesses. Everett encourages the FCC to adopt its proposal to allow permission to fax to be established without the existence of prior

⁹ See the Small Business Administration's Small Business Statistics, <http://www.sba.gov/aboutsba/sbastats.html>.

¹⁰ *Id.*

¹¹ NPRM at 75105.

written permission.

B. Everett Opposes Limiting the EBR

Small businesses engaged in essential industries are especially vulnerable under the Act. Critical communications linking socially important organizations to small businesses should be protected and permitted. Public schools rely on communications from educational support service companies to provide excellent programs for their students; retail outlets rely on faxes to place orders for important new products quickly and efficiently; medical professionals and pharmacists rely on fax machines to disseminate information about new products and medications in a timely manner, enabling them to better serve and protect their patients. Although these entities may not communicate for long periods of time, these communications are nonetheless an integral part of very important industries and societal sectors. To ensure that these organizations continuously are connected to those companies assisting the improvement of their operations, the FCC should decline to place time limits on the EBR definition.

This issue is pertinent to Everett's position as a pharmaceutical company. The pharmaceutical industry's timely communication with medical professionals must be protected. When pharmaceutical companies make advances that improve medications, or when new or complementary drugs become available, communication between the pharmaceutical company and the medical professionals alerting them of these breakthroughs is indispensable. Unnecessarily restricting this communication deprives doctors of information about the latest advances and alterations in the pharmaceutical markets, preventing them from prescribing potentially more effective medications and impairing the health and welfare of the American people.

In addition, pharmaceutical companies such as Everett must be able to communicate with pharmacies that sell their products on a retail scale. In order to respond promptly to urgent patient needs, pharmacies must stock the most advanced and effective medications. Pharmacists make their purchasing and inventory decisions based on their awareness of the pharmaceutical industry and its advances. Pharmaceutical companies must be able to communicate quickly and efficiently with pharmacists in order to provide them with this awareness. This communication, often through efficient order forms sent via fax machine, is critical for pharmacies to be able to respond to customer needs.¹² Again, the FCC should avoid limiting arbitrarily the duration of this relationship because doing so may impair the critical exchange of important information among the members of a well-recognized and defined community of interest.

C. List-makers Should Bear the Burden of Proving that Contacts Were Listed Voluntarily

The NPRM seeks comment on whether prospective senders should be required to take reasonable steps to ensure that mailing lists were compiled in a voluntary manner.¹³ Specifically, the NPRM seeks comment regarding the circumstances in which “a person has voluntarily agreed to make a facsimile number available for public distribution.”¹⁴ Placing the burden on the sender in this way is illogical and inefficient. In order to determine the voluntariness of a contact list, the potential sender would need to contact

¹² Currently, the Junk Fax Prevention Act unintentionally may prevent entities like pharmacies and doctors’ offices from communicating with pharmaceutical companies like Everett. Should a pharmacist or medical professional require immediate information for a patient about a company’s products, it may determine that a fax transmission is the most immediate way to obtain this important, detail-oriented and time-sensitive information. By faxing requests or inquiring to companies with which they lack an EBR, doctors may themselves be violating the Act. The FCC surely did not intend to cabin this type of meaningful contact and should consider these and other unintended consequences carefully as it undergoes the notice and comment process.

¹³ NPRM at 75105.

¹⁴ NPRM at 75105.

intended recipients. This contact itself may be limited by other laws.

Furthermore, many businesses purchase lists through direct marketing companies that create ready-made target audiences. Requiring businesses that purchase these lists to independently verify whether individuals voluntarily agreed to be included on the contact lists thwarts the very purpose of purchasing them; these lists play a useful economic role. The FCC's concerns about this list-making process are more appropriately directed at the list-makers themselves, who have superior knowledge of the methods and sources by which their lists were created.

D. Small Businesses Should Not Be Burdened with Excessive Record-Keeping Requirements

The NPRM requests comment on which party should be required to prove the existence of an established business relationship.¹⁵ Specifically, the NPRM seeks comment as to “how...the Commission [should] verify that a sender had an EBR and the recipient’s facsimile number prior to” the enactment of the Act.¹⁶ Small business owners should not be burdened with this requirement; instead, fax recipients who claim to be aggrieved should have the burden of proving the non-existence of an EBR. In certain industries where small businesses routinely contact customers via fax, this record-keeping would be incredibly costly and burdensome. On the other hand, requiring aggrieved recipients to disprove the existence of a business relationship would be relatively straightforward and would not entail the creation of potentially large record-keeping systems. In addition, if they have legitimate complaints, recipients are awarded the compensation to which they are entitled under the Act. Therefore, recipients should

¹⁵ NPRM at 75105.

¹⁶ *Id.*

bear this burden and small businesses should not be required to initiate a new type of record-keeping to protect themselves from future litigation.

III. THE FCC SHOULD RELY ON THE SMALL BUSINESS ASSOCIATION'S SMALL BUSINESS CATEGORIES

The FCC regulates communications in the United States.¹⁷ The U.S. Small Business Association (“SBA”) monitors the environment in which small businesses operate.¹⁸ The SBA Administrator is authorized to establish size standards for small businesses. In this complicated process, the SBA Administrator analyzes each industry and creates specific size designations.¹⁹ Because Congress specifically granted this responsibility to the SBA, the FCC should not create a separate set of designations for small businesses. Furthermore, any FCC action in this arena would complicate unnecessarily the environment in which small businesses operate; this complication would run counter to the Regulatory Flexibility Act of 1980's goals of decreasing administrative impact on small businesses.²⁰

¹⁷ 47 U.S.C. § 151 (1934). The Communications Act of 1934 was amended by the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56, 47 C.F.R. § 227 (1996).

¹⁸ The SBA was created by the Small Business Act of July 30, 1953. 67 Stat. 232, 13 C.F.R. § 101 (1953).

¹⁹ These size designations are codified in the Small Business Size Regulations, 13 C.F.R. § 121 (1996).

²⁰ 5 U.S.C. § 601 (1980).

IV. CONCLUSION

Everett urges the Commission to consider the beneficial and, in fact, critical ways that fax transmissions keep businesses and customers connected, and the ways that these transmissions benefit society. Furthermore, Everett asks the Commission to protect small businesses and their special needs by ensuring their ability to continue operations under the Act.

Respectfully submitted,

By: _____/s/_____

Don J. Peltó
Christopher S. Huther
Kristin Cleary
PRESTON GATES ELLIS
& ROUVELAS MEEDS LLP
1735 New York Avenue, Suite 500
Washington, D.C. 20006